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Carlyle Ring

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Remarks on the Background and Development of UCITA

by: Carlyle Ring[*]

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{1}It's a real pleasure to be here. My formal name as introduced is Carlyle Ring, but as Barbara Beach who was assistant city attorney when I sat on the City Council for Alexandria, knows well, everybody calls me Connie. And so please address me by my nickname: Connie.

{2}I was very struck with the thoroughness with which Joe May's committees and the advisory committees approached UCITA. It's an extremely important piece of legislature. And I'm going to tell you a little bit about the history of how we began the UCITA process and how it came into being as a product of the National Conference. I would also like to give you something of an overview of UCITA in the few minutes that I have. What are its basic outlines and provisions, and, if there's time, I'll try to address some of the more controversial policy issues which have already been mentioned. But you do have a paper in your folder which outlines in somewhat greater detail things that I'm not going to be able to cover in the brief moments that I have with you, and I tried to anticipate some issues that may come up. You will find attached to my materials not the final Bill, but essentially it captures all the amendments that were made in the process, the amendments that were made in the 2001 session. You also find an attendance record of the various drafting committee meetings of a conference when we were working on it. You'll also find reported cases on electronic self help, and you'll also find at the very end a list of cases of upholding shrink-wrap and click-wrap licenses in both the Federal Courts and the highest State courts. Since I'm not going to be able to deal with all these issues, I gave it to you in paper so that at your leisure you might look at it a little more carefully.

{3} Just a word in terms of my personal background. I have had the privilege of serving as a Virginia Commissioner on Uniform State Laws, and I must candidly tell you that when I got a call from the Governor a number of years ago inviting me to be a Commissioner I didn't know what the Conference was. A good friend of mine, Bill Thomas who was an attorney in Alexandria, Virginia, called me up and said "this is the greatest opportunity that you will ever have," and having accepted his advice I must agree. It has been a challenge. It's been a wonderful experience serving Virginia in that regard. It has consumed more of my volunteer and pro-bono time than I ever imagined. But it's rewarding in terms of the intellectual stimulus.

{4} Part of the reason that I was asked to serve as Chair of the UCITA Drafting Committee was because I had participated in other e-commerce uniform acts that had been prepared by the Conference. I was chair of the crafting committee for Article 4A, which is for wire transfers. At the time we began, there were about 300 billion dollars worth of wire transfers daily, and when we finished and actually presented the product to the States, three trillion dollars a day transferred by wire transfers, an important aspect of electronic commerce. I chaired also a committee to revise [Articles] Three and Four of the Uniform Commercial Code to provide for electronic check truncation, and then I was asked to chair a committee to provide for electronic letters of credit, the revision of UCC Article Five. In the meantime the UCITA project had been underway, but it had had some difficult times, which I won't describe in its entirety. And some had thought Connie Ring would be a good person to recruit for this project as well, and I became chairman of the drafting committee in 1996.

{5} The importance of the project is reflected by a report at the early [19]90s from the American Bar Association section on business law, a committee which studied for about two years computer law and indicated in their report that there was a desperate need, an essential need, for uniformity of rules. In this information age and when you're dealing not face to face, but you're dealing with a borderless and faceless kind of transaction, you simply could not have a different result in California than you had in Virginia. There is an absolute need for uniformity, and I really haven't found anybody, who giving serious thought to it, disagrees with that fundamental proposition. Now there are two ways in which you can achieve uniformity. You can achieve uniformity either by a federal enactment or you can do it by cooperation of various states through the uniform law process. Obviously as a Uniform Law Commissioner, my prejudice was towards trying to do it at a state level, and that's what UCITA attempts to do. I have absolutely no doubt that if the states are unable to work cooperatively together to come up with a uniform rules, and in light of the tremendous economic potential that we are already enjoying in terms of increased productivity (Alan Greenspan has commented that our economy has been enriched and the vitality depends upon the increased productivity that has been achieved by this computer age, and so its importance for the country is so great that if the states are unable to cooperate with one another in coming up with uniform rules I'm convinced that of necessity) Congress will need to intervene. Now you can make sensible arguments on both sides of the proposition as to is it best to have one bill pass through the Congress providing rules or is it better for it to be done at the state level. I've spent much of my life as a government contract lawyer, and every time we got into court we immediately were faced with the proposition that there is no federal contract law. Oh yes, there are contract forms in FAR. I dealt with them a great deal, and they set forth certain contract provisions that are going to be in government contracts but suppose the contract is silent. Where do you go? You go to state contract law because there is no body of federal contract law, and you will find that in decision after decision in the federal courts. They look to Virginia law, they look to Arkansas law, they look to California law in order to provide the principles of contract law. So it makes sense for it to be done in the holistic setting of contract law, which is largely state law rather than federal law. However it turns out we will have uniform rules within the next four or five or six or seven years, I'm personally convinced.

{6} What we have put on the table through UCITA is basically, we think, a strong starting point. Any human endeavor, no matter how hard you work, is never going to be perfect, and no one who participates in the process feels that we have come up with the Holy Bible for rules in covering the information transactions over the Internet. But we think we have made a very good start. And that's why the process here in Virginia was so important. Because it was another look. In terms of the process before the Conference, when we begin

a project, we send out communications to trade associations and to everyone that we think may have an interest, and if you reflect upon it for a moment there are an awful lot of industries that are converging in the information arena that have an interest in the subject matter of this particular bill. Therefore we had 12 or 13 groups that participated in our meetings by invitation. The listing in the meetings, 16 drafting committee meetings, are in attachment materials. And if you'd look at that very carefully you'll see that there were, after you took away the government officials the commissioners who were sitting there, and look at the observers who came to actively participate in our deliberations, about one-third attending our meetings were licensees, about one-third were licensors, about one-third were both licensors/licensees, like your company, Joe. And so we had a very full kind of dialogue. What we would do is present the particular provision beginning on Friday morning. We went from Friday morning, all day Friday, all day Saturday, and half of Sunday, and section-by-section word-by-word I would first call upon the observers. What do you think of this? What are your policy problems with it? What are your difficulties with wording? Does it come out with the right balance? And after I'd gone around the table for really some very effective debates, we would then bring it up to the commissioners for a vote as to what policy choice we were going to make. As I said, we had 16 drafting committee meetings. All together it was pretty well balanced as we went along. To the extent I had any bias as chair, I was at the time general counsel of Atlantic Research Corporation (ARC). ARC is a licensee--not a licensor. We licensed software. Occasionally we get a custom-made set of software that we own. So, to the extent I had personal experience as general council, it was in terms of the licensee side of the table and negotiating the license for the development of the software or the information product.

{7} We did use, and I want to refer to it in particular, the model of the Uniform Commercial Code, particularly Articles 2 and 2A, as sort of a beginning. The ABA Committee that recommended that the Conference proceed felt very strongly, and in the report stated it strongly, that intangibles and the information not fit in a mold that is appropriate for tangible goods. And therefore it is important that there be rules that make an adjustment and appreciate the difference when you're dealing with information where you have intellectual property rights, where you have First Amendment concerns, which are vastly different from the kinds of issues that arise when you're dealing with tangible goods. And therefore there are many adjustments, necessary adjustments, to the Article 2 framework.

{8} If you look at page one of my materials; I just want to give you a snapshot. Basically UCITA follows the proposition that is inherent in the Uniform Commercial Code, and in Article 2 in particular, that innovation and competition is best fostered in a free market where the parties may choose the technology and business models that best suit their transaction. And therefore approximately two-thirds of what you have in UCITA, which is fairly thick (but if you compare it to Article 2 they are equal in thickness, equal in the number of sections); two-thirds of Article 2 and two-thirds of UCITA are what we call gap-filler or default rules. What I mean by that is that if the parties include in their agreement an express provision with respect to a particular subject matter, that express term governs. Like the definition of agreement in Article 2, the definitions of agreement in UCITA and Article 2 are identical. If there is silence by the parties [and] they have no express term, then you look at trade usage or the course of dealings of the parties to see whether the gap can be filled by trade rules or by course of conduct of the two parties that are engaged in the contract. If that isn't helpful to you, contract is silent and you have an issue, trade usage doesn't help you, course of dealing doesn't help you in filling in the gap; only then do you look to the gap filler rules of UCITA, just as only then do you look to the gap filler rules in connection with an Article 2 transaction in goods. So the parties are totally in control with respect to what they want in their agreement for the most part.

{9} In terms of another 25 percent of UCITA, we're dealing with formation rules. Now again in connection with UCITA, the formation rules draw very heavily on Article 2, but with a major difference and a major change. If you're online in the Internet or you're engaged in purchasing software, you're already in the digital world, the intangible world, and you're dealing with contract formations which are made in a borderless and faceless environment. And under those circumstances it is necessary to have special rules that apply. And so the Article 2 rules are expanded to cover the fact that virtually all these transactions [that] fall within UCITA

are going to be electronic.

{10} Now another element of UCITA also like Article 2 but more expansive than Article 2, are what we call non-variable rules. Those non-variable rules I believe are set out in Section 113 of the Virginia Act. I think that's 113. And in that section you have a list of all the sections of UCITA which are non-variable. That is, if the parties try to contract on that subject differently than the non-variable rule, the non-variable rule controls. Now some of those are familiar concepts like the "unconscionability" provision, which is included in Article 2, also is in UCITA. If a term or provision in the contract is unconscionable either substantively or procedurally, that term is not enforceable. But in addition there are more non-variable rules in UCITA, and I'm not going to articulate them all, that are new, that are different non-variable rules from those that are included in Article 2.

{11} The next thing that I was going to do, and I'm going to skip over it quickly, because Joe has already covered it pretty thoroughly, are the changes that were made through this very long, deliberative, and thorough process that occurred in the Advisory Committee in Virginia and then before JCOTS and the legislative committees. Joe has already mentioned that certain changes were made in electronic self help. That's at page 7 of my materials. There is another change that is related to that, but I think significant, and that's on page 8, the automatic passive restraints. A passive restraint is basically a restraint where if I give you a license that says you have 20 users and you try to add a 21st site, a 21st user, the software programming will prevent you from adding the 21st. But you still have the use of the 20. It simply enforces the contract term electronically. And there was a concern that the way we had phrased the definition in the original uniform act, and also in terms of the interrelationship with electronic self help, that there might be a loophole for someone who might use passive restraints in order to remedy a breach. And the purpose of the changes that were made in 605 were to make sure that that loophole is thoroughly closed. Joe mentioned that a third element, which is consumer protections and amendments, were made to the Consumer Protection Act; very important clarifications were made. It had always been the intent that that kind of study should be undertaken by each state because it is the intent of UCITA that any consumer protection law of Virginia, and indeed of any other state, is to trump any provision in a UCITA contract. And that needs to be tailored to the particular law of that particular state, and I think that has been done rather thoroughly now in Virginia.

{12} Joe mentioned transferability, and there are provisions concerning libraries. Joe is right. I spent with a real dedicated group a lot of time talking through the issues in connection with libraries, and I'm happy to say, and I think Jim Heller will say later in the program the compromise that we worked out is not a perfect compromise. I can tell you that the software industry information industries were willing to go along with the compromise, but they weren't happy with it, and I think Jim Heller later in the program will say that the Virginia Library Association went along with it, but weren't entirely happy with it either. Maybe that's what makes it a good compromise. But fundamentally, and I think it's worth dwelling on it for just a second, the copyright law which is federal preemptive law basically provides certain balance in connection with libraries and educational institutions, which are primarily factors to be considered fair use for example has four factors that have to be taken into account. They're subjective. There are no bright lines, and it's a case-by-case kind of analysis we have to make. Now industry and practice and decisions have gradually formulated some guidelines in terms of how it applies when we have a tangible book. With a tangible book, it is sometimes more expensive to copy the whole book and violate the copyright, than to go out and purchase another book. So there's a certain self-policing of the copyright and the intellectual property rights when you're dealing with a book, but it's much more difficult for that to occur when you're dealing with a digital product that can be downloaded by a patron of the library and given to all his best friends and colleagues and the whole world and that does cut into the marketability of a particular product. As Joe May mentioned, when I, on behalf of Atlantic Research, get a custom software, I may pay a half million, a million, two million, three million dollars, in order to get to own that custom software. That's what it costs to develop it. When you license it, and you are able to license it to a lot of different people, you can charge \$30 or \$40 or \$50 for that particular product because you spread out the cost to the whole market. And if the owner and developer of the

information product is going to have to make one charge to cover all his development costs, it's going to be a big charge, and therefore the licensing system provides a cheaper product for people to use on a broad scale. But if a patron is distributing all of that information free of charge to a broad audience obviously it undercuts the economic value of licensing and forces you to the model of charging a higher initial cost for the product. What we did was to say, with respect to this library resolution, is if you have a tangible medium like a CD-ROM then the rules that have been set forth in connection with paper will also apply to that digital product, and the rules of copyright will apply unless the library separately assents to a different set of rules. And there are certain requirements that they have notice of that or reason to know in advance. And if the vendor does not give them that information in advance, then the default rules apply even though there is a separate assent. So the expectation is that for most products in that tangible form probably the copyright rules are not going to be varied by the vendors, and if they want to vary them they will have to go through a separate assent in a careful procedure in order to accomplish that result.

{13} We were not able in our discussions to deal with a bigger problem that I just talked about where you have proliferation of reproductions from a patron in a totally digital electronic media; where the discussion is centered, and at the end of my materials you'll see some of that discussion before Congress and the Copyright Office. The Copyright Office has been petitioned for exemptions and amendments to the Copyright Act to deal with the issue of how you deal with online kinds of transactions. And so far neither Congress nor the Copyright Office have felt that they had a handle on how to do this. And I suspect in time the Congress and the Copyright Office will. But the forum for deciding that, at least in the view of UCITA, is not in the states, which have no expertise in their legislature and no expertise in their courts to deal with copyright issues of this complexity, and the right forum and the right legislative place is in the Congress which has, under our federal Constitution, the responsibility for copyright and patent law.

{14} I think that I only have maybe three or four more minutes, and I would like to cover, if I may, just a couple points, and those points are in the anticipation of what might be talked about later in the program. First, I would like to talk a little bit about assent under UCITA. I mentioned that there are a list cases on shrink wrap and click wrap licenses, which are attached, references to them, are attached in the materials I provided you. shrink wrap is a situation where I get a package and it says on the outside, "if you open up the package, you've agreed to the terms that are inside." And in most circumstances, courts have upheld that. I'm bound by the terms even though I don't see them. We have a similar problem in connection with warranties in the box when you buy a TV. You don't see the warranties until you open the box, and then you find a piece of paper with the warranties that you're getting. What UCITA does is fences in and reduces and limits the shrink-wrap decisions and click-wrap decisions by first saying there must be an opportunity to review before there is a binding contract. Now there are many circumstances where we don't read the contract. I sign a rental contract agreement. When I get up to the desk, I don't read the terms although they are two or three pages long. When I sign, I've agreed to that. So it isn't forcing people to read. They don't have to read it, but they must have an opportunity to review it before there's a binding contract. The second step in UCITA is a very clear definition as to when I have signed. By signing there must be an intent to sign. It's an important evidentiary proof so that if I type in on my computer "Carlyle C. Ring" as evidence that I am agreeing to the agreement, I've got to have the intent to do that. If I say I typed in my name, yeah I did that but I didn't know I was agreeing to this license. The burden of proving that is on the vendor to prove that when I typed it in I had to have had the intent to sign. Similarly if I click "I agree," it must be an intentional act and the burden of persuasion is upon the vendor in most cases, although there might be circumstances the other way, to prove that it was an intentional act on my part. The third element is authentication, or perhaps, rather, attribution, and I probably should use the term security agreement. The third element is to prove that when Carlyle C. Ring signed, he was signing on behalf of Atlantic Research with authority. An element that as general counsel to Atlantic Research I was vitally interested in it. I don't want anybody in Atlantic Research just signing on and binding Atlantic Research to licenses and agreements that they don't have authority to enter into. The security procedure provided by the vendor must be a commercially reasonable security system. It may be a low threshold if you're dealing with products that only cost \$30 or \$40, but if it's a higher volume,

the security must be commercially reasonable for that particular transaction.

{15}A fourth element, and that is spelled at page 11, I'm running out of time so I'm not going to even go through it, but under section 208 of the Official Comments we have sort of a road map giving the circumstances in which if I tell you the terms are coming later what happens. Basically, if I don't tell you the terms are coming later, under UCITA it is clear that it is an offer for a modification to the contract. If, on the other hand, I know the terms are coming later, but the contract is not intended to be binding unless I agree to the later terms, then UCITA provides that if I reject the later terms, we simply unwind the contract. The third scenario is I know the terms are coming, and I have agreed that the terms are going to be binding on me when I receive them. Under certain circumstances in UCITA that can be done, and the provisions are listed.

{16}I wanted to speak a little bit about consumer protections in a little more detail, but I think I've run out of time. And you will find a more detailed listing of those in the materials that I have given you. And I do appreciate the opportunity to be here and hope that I've given you enough of the overview to assist you as you deal with the other topics that are going to be before you during the course of the day.

ENDNOTES

[*]. An experienced commercial law attorney, Carlyle Ring handles the negotiation and documentation of commercial agreements for the purchase and sale of goods and services, alliances and joint ventures with U.S. and international entities, the acquisition and sale of operating businesses, the preparation of standard terms and general business transactions for Ober Kaler Grimes and Shriver in Washington, D.C. Mr. Ring has considerable experience in matters involving the Uniform Commercial Code and its application to a wide range of transactions. He served as president of the National Conference of Commissioners on Uniform State Laws (NCCUSL) from 1983-1985. He has chaired UCC drafting committees, including the UCC Article 4A committee in 1989, the UCC Revised Article 3-4 committee in 1990, the UCC Revised Article 5 committee in 1995, and the UCITA committee in 1999. Mr. Ring has served on the UCC Permanent Editorial Board since 1985.

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